

James P. McCarthy
(612) 371-3238
jmccarthy@lindquist.com
www.lindquist.com

Lindquist & Vennum LLP
4200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
Phone: (612) 371-3211
Fax: (612) 371-3207

December 13, 2013

VIA ECF
Courtesy Copy to Chambers via Federal Express

Hon. Joseph F. Bianco
United States District Court
Eastern District of New York
100 Federal Plaza
Central Islip, New York 11722

Re: Moss v. BMO Harris Bank, N.A., First PREMIER Bank, et al.
Case No. 13-cv-5438

Dear Judge Bianco:

I write to request a pre-motion conference concerning the motion that First PREMIER Bank (“First PREMIER”) intends to file. First PREMIER intends to file a motion to compel arbitration under the Federal Arbitration Act.

The Court has already set a telephone conference hearing on Monday, December 16, 2013 at 3:00 p.m. in this case in response to the pre-motion filing made by defendant BMO Harris Bank. Counsel for First PREMIER Bank will participate in that conference call. First PREMIER’s motion to compel arbitration is similar to the motion to compel arbitration filed by BMO Harris.

First PREMIER reserves its right to bring a Rule 12(b)(6) and (b)(7) motion to dismiss the complaint for failure to state a claim and for failure to join an indispensable party if arbitration is not compelled or if the Court prefers that the arbitration and Rule 12 motions be addressed at the same time. First PREMIER’s Rule 12 motion would be on grounds similar to those set forth in the motions filed by defendants BMO Harris and Missouri Bank & Trust.

Background

This case is one of six nearly identical putative class actions that have been filed in six separate district courts against First PREMIER, all by the same plaintiffs’ counsel. In each case, the plaintiffs allege that they reportedly obtained “usurious” loans with online lenders. Instead of suing those lenders, the plaintiffs sued First PREMIER (and other banks) for processing electronic payments between plaintiffs and their lenders on the ACH network seeking damages

and injunctive relief, plaintiffs assert claims under the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. § 1962, and various state-law causes of action.

Plaintiff Deborah Moss (“Moss”) seeks relief from three separate loans with two different lenders: (1) a June 17, 2010 loan from SFS, Inc.; (2) an October 15, 2010 loan from SFS, Inc.; and (3) a May 8, 2013 loan from Lenders International, CCI. She alleges that First PREMIER allegedly processed payments related to the SFS, Inc. loan in 2010. *See* Compl. ¶¶ 76-86. The claims against First PREMIER are based exclusively on the June 17, 2010 loan from SFS, Inc. (Compl. ¶¶ 76-78.)

Motion to Compel Arbitration

First PREMIER intends to move to compel arbitration of the claims against it and to stay further litigation of these claims pending the outcome of arbitration. 9 U.S.C. § 3. In her complaint, Moss neglects to mention that the challenged loan agreement requires her to resolve any dispute relating to the loan in arbitration on an individual basis rather than in a class action in court. The Federal Arbitration Act, 9 U.S.C. §§ 1-16, requires her to honor that commitment.

Moss cannot sidestep arbitration by omitting her lender from the complaint and instead suing First PREMIER. Her claims against First PREMIER are wholly intertwined with and dependent upon the terms of her loan and the alleged actions of her lender. Moreover, the loan agreement expressly contemplates First PREMIER’s role in processing payments between Moss and her lender via the ACH network. Accordingly, the doctrines of equitable estoppel, third-party beneficiaries and agency entitle First PREMIER to invoke the arbitration clause in Moss’s loan agreement.

We thank the Court for its consideration and look forward to discussing this motion further at the pre-motion conference.

Sincerely,

LINDQUIST & VENNUM LLP



James P. McCarthy

JPM/smgt

cc: Counsel of Record (*Via ECF only*)

CERTIFICATE OF SERVICE

I certify that on this 13th day of December, 2013, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of the filing to the attorneys on that system.

Darren T. Kaplan
CHITWOOD HARLEY HARNES LLP
1350 Broadway
Suite 908
New York, NY 10018
917-595-4600
Fax: 404-876-4476
dkaplan@chitwoodlaw.com

David Todd Feuerstein
Herrick, Feinstein LLP
2 Park Avenue
New York, NY 10016
212-545-3477
dfeuerstein@herrick.com

Attorney for First PREMIER Bank

Jeffrey Ostrow
KOPELOWITZ OSTROW P.A.
200 S.W. 1st Avenue
Suite 1200
Fort Lauderdale, FL 33301
954-525-4100
Fax: 954-525-4300
ostrow@kolawyers.com

Courtney Janae Peterson
BRYAN CAVE LLP
1290 Avenue of the Americas
New York, NY 10104
212-541-2000
Fax: 212-541-1487
courtney.peterson@bryancave.com

Attorney for Bay Cities Bank

Norman Siegel
Stephen N. Nix
STUEVE SIEGEL HANSON LLP
460 Nichols Road
Suite 200
Kansas City, MO 64112
816-714-7101
siegel@stuevesiegel.com
six@stuevesiegel.com

Therese Craparo
MAYER BROWN LLP
1675 Broadway
New York, NY 10019
212-506-2500
Fax: 212-262-1910
tcraparo@mayerbrown.com

Attorneys for BMO Harris Bank, N.A.

Attorneys for Plaintiff Deborah Moss



James P. McCarthy